

(2021) 12 BOM CK 0100
In the Bombay High Court
Case No : Criminal Appeal No. 1060 Of 2019

Jabbar Isak Shaikh And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 06-12-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 489, 489A, 489B, 489C, 489D, 489E, 489F, 489(B), 489(C)
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2021) 12 BOM CK 0100

Hon'ble Judges : Anuja Prabhudessai, J

Bench : Single Bench

Advocate : Neville Deboo

Final Decision : Allowed

Judgement

Anuja Prabhudessai, J

1. This appeal is directed against the Judgment and Order dated 21st January 2019 in Sessions Case No.420 of 2016, Greater Mumbai.
2. By the impugned Judgment, the learned Additional Sessions Judge, Greater Mumbai, has held the Appellants (hereinafter referred to as the Accused Nos.1 and 2) guilty of offences under Sections 489 (B) and 489 (C) read with 34 of Indian Penal Code. They have been sentenced to undergo Rigorous Imprisonment for ten years with fine of Rs.10,000/-in default six months for offence under Section 489 and five years with fine of Rs.5,000/- in default three months in respect of offence under Section 489 C read with 34 of Indian Penal Code.
3. The case of the prosecution in brief is that on 15th March 2016 PW-1 Arif Khan police Naik attached to Sion Police Station received secret information that two persons from West Bengal were in possession of counterfeit notes. He passed on the information to PW-5, Mr. Santosh Gaikwad, A.P.I. at Sion Police Station. PW-5

arranged a trap and he along with PW-1 and other police personnel proceeded near Krushna Bhuvan, Bus Depot, Sion. They saw one person offering a note of Rs.1,000/- to a taxi driver and later to the owner of a grocery shop and asking them for change. They refused to accept the currency note. While the said person was proceeding to another shop, PW-5 and the other police personnel caught him. PW5 introduced himself and the other members of the police staff and took search of the said person in presence of the panchas and recovered nine notes in denominations of Rs.1,000/- each from the said person. The said notes, which appeared to be counterfeit notes, were seized under Panchanama.

4. Accused No.2 was arrested on 17th March 2016. Pursuant to the disclosure statement made by him, 10 currency notes of Rs.1,000/- denomination were recovered from his house and seized under Panchanama at (Exh.29) drawn in presence of PW-2 Madan Sharma. Investigating Officer recorded statements of the witnesses. The said notes were sent to Currency Press Note, Nashik Road for opinion and it was opined that the said notes were counterfeit notes. Upon completion of the investigation, PW-5 filed the chargesheet against both the accused for offences under Section 489B and 489 C of the Indian Penal Code.

5. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined five witnesses. The statements of the accused were recorded under Section 313 of the Code of Criminal Procedure, 1973. The accused No.1 admitted that his personal search was taken near Krushna Bhuvan, Bus Depot, Sion and nine currency notes of denominations of Rs.1,000/- were recovered from his possession and same were seized under Panchanama. He has admitted that these notes are counterfeit notes. The accused No.1 has in fact admitted almost all the incriminating circumstances appearing not only against him but also against accused No.2. The defence of the accused No.2 is total denial.

6. Learned Sessions Judge after considering the evidence on record has observed that the notes which were forwarded to Nasik Press for opinion at Exh. 25 are counterfeit notes. Learned Sessions Judge has further observed that the prosecution has proved that the nine notes were recovered from the possession of accused No.1 whereas 10 counterfeit notes were recovered pursuant to the disclosure statement of accused no. 2. Learned Sessions Judge has taken note of the fact that though the answers given in the statement under Section 313 of the Code of Criminal Procedure cannot be made basis for conviction, the same can be used for appreciating the evidence adduced by the prosecution. Learned Sessions Judge held that the prosecution has proved that the accused were in possession of counterfeit notes and that the accused have not offered any explanation. Learned Sessions Judge therefore, held that the prosecution has proved the essential ingredients of 489B and 489C and thus, convicted them as stated above. Being aggrieved by conviction and sentenced, the Appellants have preferred this appeal.

7. Heard Mr. Neville Deboo, learned Counsel for the Appellants and Mr. S. V.

Gavand, learned APP for the State. I have perused the records and considered the submissions advanced by learned Counsel for the respective parties.

8. The charge against the Appellants is that they were in possession of counterfeit notes and that they had used the said notes as genuine notes. The accused are therefore charged for offences punishable under Sections 489B and 489C read with 34 of the Indian Penal Code, which read thus:-

9. In Umashankar Vs. State of Chattisgarh, AIR 2001 SC 2074, the Apex Court has observed that :-

"7. Section 489 A to 489 E deal with various economic offences in respect of forged or counterfeit currency notes or Bank notes. The object of legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency notes and bank notes. The currency notes are, inspite of growing accustomedness to the credit cards system, still the back bone of the commercial transactions by multitudes of in our country. But these provisions are not meant to punish unwary possessors or users.

8. A perusal of the provisions, extracted above shows that mens rea of offences under Section 489 B and 489 C is "knowing or having reason to believe the currency notes or bank notes are forged or counterfeit". Without the aforementioned mens rea selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency note or bank note is not enough to constitute offence under Section 489 B of IPC. So also possessing or even intending to use any forged or counterfeit currency note or bank notes, is sufficient to make out a case under Section 489 C in the absence of the mens rea noted above."

10. In the instant case it is alleged that on 15th March 2016 PW1-Arif Khan, Police Naik attached to Sion Police Station, was on duty near Ramdev Hotel, Sion Station (west). He has deposed that he had received secret information that two persons were in possession of counterfeit notes. He conveyed this information to A.P.I. Gaikar (Gaikwad), Sion Police Station, pursuant to which A.P.I. Gaikar (Gaikwad) formed a team and told them to keep a watch on the said persons. At about 3.30 p.m. he saw two persons entering UP Dairy and asking for change of Rs.1,000/-. The owner of the said UP Dairy shop refused to give them change, hence they went to another store and asked for change. The said person also refused to give them the change. Thereafter PW1 and the other police staff caught these two persons and on being questioned they were unable to give satisfactory answers. API Gaikwad took both the persons to Sion Police Station. They took search of the said persons and found nine currency notes of Rs.1,000/- denomination which appeared to be counterfeit notes. He has further stated that they had taken their search near the shop and found nine counterfeit notes and that thereafter, they had called two Panchas and taken personal search of these persons in their presence. He states that both these persons had

disclosed their names as Jabbar Shaikh (accused No.1) and Piyaarul Alihasan Mondal (accused No.2). He therefore lodged a complaint against these accused at Exhibit-24. In his cross-examination, he has stated that his superior had not told him to call the pancha witness and that he had called the said pancha witnesses. He later changed the version and claimed that the pancha witnesses were present when the accused were taken in the custody and that A.P.I. Gaikar (Gaikwad) came to the spot along with Panchas.

11. The evidence of PW-1 indicates that both the accused persons were arrested while they were trying to use the counterfeit notes as genuine notes. This witness has given different versions regarding search and seizure of counterfeit notes. Initially he had stated that the personal search of the accused was taken at Sion Police Station and the notes were recovered and seized at Sion police station. He subsequently claimed that the search of the accused persons was taken in front of the shop in presence of Panchas. He has deposed that he had called the panchas but later claimed that API Gaikwad had come along with panchas. He has deposed that the accused were taken into custody in presence of panchas. The evidence of indicates that they had arrested both the accused on the same day near Ramdev Hotel, Sion (west). He has merely stated that 9 currency notes of Rs.1000/- were recovered from them without specifying whether these notes were recovered from accused No.1 or accused No.2 or from both.

12. PW4-Mutukumar is one of the witnesses to the panchanama at Exhibit-37. He has deposed that on 15/03/2016 at about 3.00 p.m. he was called near Krishna Bhavan bus stop at Sion. He has deposed that the police had caught one person, who had disclosed his name as Jabbar Shaikh (A1). He has stated that the police had taken search of the said person and recovered 9 currency notes in denomination of Rs.1000/- from the right hand side pocket of his pant. The said notes appeared to be counterfeit notes and the same were attached under panchanama at Exhibit-37.

13. PW1 claims that both the accused were arrested on 15/03/2016 while they were trying to use the counterfeit notes as genuine notes. Whereas PW4 claims that only accused No.1 was arrested in his presence on 15/03/2016. PW-3 Motilal Yadav, the owner of the UP Dairy shop at Sion claims that on 15th March 2016 one person had came to his shop and requested for change of Rs.1,000/-. He has identified accused No.2 as the person who had come with a note of Rs.1,000/-. PW-5 Santosh Gaikar (Gaikwad) has given yet another version. He claims that accused No.1 was arrested on 15th March 2016, when he was attempting to use counterfeit notes as a genuine note. He has stated that the accused No.1 tried to run away but was caught by them. His personal search was taken and 9 currency notes of denomination of Rs.1000/- each were recovered from him. His evidence indicates that the accused No.1 had taken them to Sion Railway Station on 17th March 2016 and pointed out to accused No.2, who was also allegedly involved in similar offence. He claims that custody of accused No.2 was taken on 17th March

2016. The prosecution has also not placed on record the arrest Panchanama in respect of accused No.2. This assumes significance as evidence of PW1 indicates that both accused were arrested on 15/03/2016 near Ramdev Hotel, Sion, while they were trying to use counterfeit notes as genuine notes.

14. PW-5 has deposed that accused No.2 had disclosed that he was in possession of ten counterfeit currency notes given to him by one Moni and that he was ready to produce the said notes. PW5 claims that he had recorded the disclosure statement made by accused No.2 in presence of Pancha witnesses. Thereafter, he along with accused No.2 and the Panchas proceeded towards Santoshi Mata Mandir at Santosh Bhuvan at Nallasopara. He claims that they went to Room No.4 of Sai Darshan Chawl and that the accused No.2 entered the said room and removed ten currency notes which were kept in a box. The said currency notes which appeared to be counterfeit notes were seized under Panchanama at Exhibit-28.

15. PW-2 Madan Sharma who is a witness to the said recovery Panchanama does not claim that the notes were recovered from a room in Sai Darshan Chawl at Nallasopara. He claims that the said notes were recovered from a room in Gupta Chawl at Vasai Pada. The evidence of PW-2 thus does not corroborate the evidence of PW-5 regarding recovery of counterfeit notes as per the disclosure statement of accused No.2. It is also pertinent to note that PW5 has admitted in his cross-examination that the police had obtained his signatures on blank papers. This statement raises a serious doubt about the genuineness of the recovery Panchanama.

16. The inconsistency and discrepancy in the evidence of the prosecution witnesses casts a serious doubt on the prosecution case. The prosecution having failed to establish the guilt of the accused persons beyond reasonable doubt, the conviction cannot be based solely on the explanation given by the accused No.1 in his statement under Section 313 of the Criminal Procedure Code.

17. Under the circumstances and in view of discussion supra, the impugned judgment and order cannot be sustained. Hence the following order:-

ORDER

(i)The Appeal is allowed.

(ii)The impugned Judgment and Order dated 21st January 2019 in Sessions Case No.420 of 2016, Greater Mumbai is quashed and set aside.

(iii)The accused is acquitted of offences under Sections 489 (B) and 489 (C) read with 34 of Indian Penal Code.

(iv)Their bail bonds shall be discharged.

(v) The fine amount, if paid, shall be refunded to the accused.

(vi)The accused to furnish bonds under Section 437 A of Criminal Procedure

Code, 1973 before the Sessions Court within a reasonable time.